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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Closed Captioning and Video Description of
Video Programming

Implementation of Section 305 of the
Telecommunications Act of 1996

Video Programming Accessibility

MM Docket No. 95-176

COMMENTS
of
ACCESS TELEVISION NETWORK, INC.

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February 28, 1997

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Access Television Network, Inc. ("ATN") submits these comments in response to the *Notice of Proposed Rulemaking* ("NPRM") released by the Federal Communications Commission ("Commission") on January 17, 1997, in the captioned matter. As these comments demonstrate, the economic burden of requiring the close captioning of infomercials, as a class of video programming, outweighs the benefits derived therefrom, and therefore, such requirements would be contrary to both Congressional intent and the public interest. Hence, ATN requests the Commission to exercise its authority pursuant to Section 713(d)(1) of the Communications Act¹ and grant infomercials regulatory exemption from any mandatory captioning requirements.

¹ Section 713(d)(1) provides that: "the Commission may exempt by regulation programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or owner of such programming." 47 U.S.C. § 613(d)(1).

I. BACKGROUND AND OVERVIEW OF ATN

ATN's principal business consists of identifying and contracting for the purchase of under-utilized program time on cable systems (referred to as "remnant time") and re-selling the time to infomercial producers and advertisers at reasonable rates. ATN operates the largest network exclusively dedicated to the distribution of long-form paid programming, principally infomercials. The infomercials exhibited by ATN are typically 30-minute television commercials produced in either documentary or talk show format featuring educational, self-improvement, fitness, kitchen and consumer products.² ATN distributes the infomercials to cable operators and currently reaches 21 million homes for at least 11 hours a day on over 250 cable systems and DBS distributors.³ ATN has no ownership ties to the cable industry.

Until recently, many cable operators were unaware of the large amount of remnant time that existed on their systems. Such remnant time includes off-air periods of broadcast channels and cable networks, classified ad channels, barker channels, default channels, duplicated signals, and unfilled local origination time. In ATN's experience, a cable system typically has more than 12 hours per day of such remnant time that can be utilized for infomercials and long-form advertising.

ATN was founded in 1993 based on the extant amount of remnant time on cable systems. ATN's founders saw an opportunity for a service that would act as intermediary between cable

² Examples include major producers of infomercials, notably those of Nordic Track, Health Rider, and Victoria Principal, as well as lesser known entities such as Magination Entertainment, Brad Richdale, Mega Systems, and Bosley Medical Institute.

³ ATN has contracted with most of the largest MSOs, including TCI, Time-Warner, and Continental, for blocks of remnant time.

systems that were losing revenue as a result of under-utilized channel capacity and long-form advertisers seeking reasonably priced, half-hour blocks of time on which they could effectively market their goods and services. In addition to making life easier for cable systems, ATN offers long-form advertisers, including infomercials, a more efficient, reasonably-priced method of purchasing time on cable systems nationwide and eliminates the need for advertisers to negotiate with each cable system individually. Finally, ATN's rates are lower than if the advertiser negotiated independently with each cable system for individual blocks of time. The fees that long-form advertisers pay ATN are based on the full-time equivalent ("FTE") subscribers, a measurement of the number of subscribers that would be covered by ATN if it were a single 24-hour channel. ATN currently reaches approximately 7 million FTE subscribers and sells time over the network at a rate of approximately \$2.40 per FTE subscriber.

ATN has invested over \$10 million in start-up costs to date, including \$3.0 million for the establishment of a state-of-the-art video delivery system as well as securing a satellite transponder lease valued at \$10.6 million. ATN has incurred a total of \$9.1 million in losses in fiscal years 1994 and 1995 and 1996 and does not expect to break even financially until the end of 1997. In short, ATN has made these significant investments in the reasonable belief that an economically viable market with attractive financial incentives will continue to exist for the production and airing of infomercials as a substitute for remnant time. Commission action that reduces these incentives would have a serious and detrimental impact on ATN.

ATN is requesting regulatory exemption of infomercials from the Commission's closed captioning requirements because: (1) the economic burden of captioning infomercials outweighs the benefits; (2) inherent characteristics of infomercials warrant their exemption from captioning

requirements; and (3) Captioning of infomercials is best left to the natural incentives of the marketplace.

II. THE ECONOMIC BURDEN OF CAPTIONING INFOMERCIALS OUTWEIGHS THE BENEFITS.

The Commission's objective of ensuring access by the hearing-impaired to a wide range of programming may be achieved, even if certain narrowly defined classes of programming, like infomercials, remain uncaptioned. The additional cost associated with captioning infomercials is too high relative to the benefits captioning would offer to the very limited audience infomercials reach. Infomercials are typically aired during a network's remnant or otherwise under-utilized time. In contrast to most other classes of programming, infomercials reach a very limited audience base, mostly during the very early morning hours. The small audience for infomercials in comparison to other nationally broadcast programming renders the benefits of their captioning relatively insignificant when compared with other types of programming.

Furthermore, the nature of infomercials and the typical manner of their production renders captioning cost prohibitive. Infomercials usually employ an informal format consisting of a dialogue or a group discussion. These programs are often improvised and frequently include audience participation. For these productions, advance scripts in written or electronic form are not generally available. Therefore, the producers of infomercials would have to employ the services of stenocaptioners which would result in much higher costs than those involved in captioning of other classes of programming through "off line" or electronic newsroom captioning. These additional costs are particularly burdensome when the relatively low production budget of many infomercials is taken into consideration.

What is also of paramount importance is that infomercials, unlike other classes of programming, such as news or children's programming, are typically unable to recover even a portion of the additional costs of captioning through financial assistance from public funding sources such as the Department of Education ("DOE"). Currently, DOE financial assistance represents approximately 40% of the cost of all captioned programming. However, this funding is only available for programming like national news, children's programming, movies and prime time specials that reach the largest audiences.⁴ As a result, infomercial producers have to assume the entire cost of captioning. The additional costs associated with captioning may therefore cause the elimination of some infomercials. Low budget productions which are least likely to receive public funding for captioning are therefore least likely to survive the additional costs of captioning and would, as a result, be eliminated - causing a reduction in the diversity of programming.⁵ Therefore, the relatively high cost of captioning, lower level of anticipated benefits due to a limited audience, and unlikelihood of receiving financial support from public funding sources indicate that the economic burden of captioning infomercials outweighs the benefits.

⁴ See NPRM at ¶ 10.

⁵ The Commission recently recognized the contribution of part-time programming (i.e., programming in half-hour increments) to the overall diversity of programming in requiring cable operators to lease time to commercial entities in half-hour increments. See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access*, Second Report and Order and Order on Reconsideration of the First Report and Order, CS Docket No. 96-60, at ¶ 62 (1997).

III. INHERENT CHARACTERISTICS OF INFOMERCIALS WARRANT THEIR EXEMPTION FROM CAPTIONING REQUIREMENTS.

The Commission should consider that a great deal of the content of infomercials is already accessible to hearing-impaired persons even without captioning. Infomercials often visually display the products they advertise. Other product information including pricing, disclaimer notices, warranties, and response mechanisms are also most often visually displayed. The graphical and visual nature of product information associated with infomercials further reduces the additional benefits of their captioning relative to the costs associated with captioning.

Furthermore, since product information is often visually displayed in an infomercial, great care must be exercised in inserting the captioning so not to block the visual messages already in display. This additional requirement increases the time spent in inserting captions, resulting in higher costs. Increasing the costs of producing infomercials will force their producers to reduce their budgets for the purchase of media for their broadcast. Such an outcome would have a severe detrimental impact on ATN and other resellers of cable systems' under-utilized time to the producers of infomercials.

IV. CAPTIONING OF INFOMERCIALS IS BEST LEFT TO THE NATURAL INCENTIVES OF THE MARKETPLACE.

The voluntary efforts of the broadcasting industry coupled with the financial assistance of government agencies has lead to the development of the closed captioning technology and the captioning of a large percentage of television programming aired today. Producers of infomercials have the added incentive of increasing their audience base through the captioning

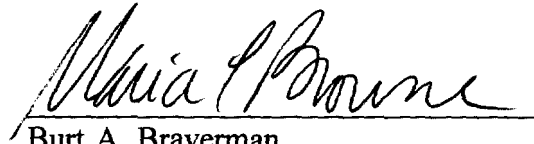
of their programs and therefore capturing the hearing-impaired audience and increasing their projected revenues.

As closed captioning becomes more widespread and as the costs associated with its inclusion in video programming decline, producers of infomercials would have additional incentives to voluntarily caption their programs. Allowing the marketplace incentives to naturally compel infomercial producers to caption their programming rather than imposing a blanket regulatory requirement would permit those with financial resources to provide the captioning now, while allowing others with more limited financial resources a chance to develop the resources in order to provide captioning in the future. The marketplace incentives for captioning will only increase as more programming is being captioned because it is in the best interest of producers of infomercials to create the same look and feel for their programs as those of the surrounding programming.

In summary, given that the financial burden of captioning infomercials is relatively high compared to the relatively low level of benefits, due to their limited audience and their inherently visual characteristics, ATN urges the Commission to exempt infomercials as a class of

programming from any captioning requirements, and allow the marketplace incentives to dictate the terms of their captioning.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Maria T. Browne", written over a horizontal line.

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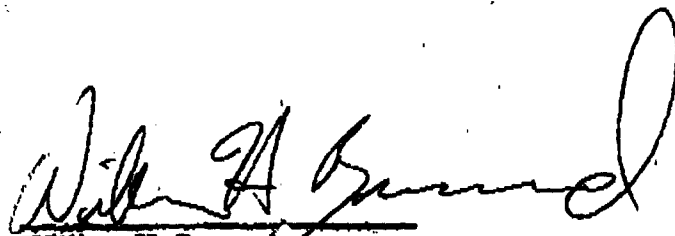
Attorneys for:

Access Television Network, Inc.

February 28, 1997

DECLARATION

I, William H. Bernard, President of Access Television Network, Inc., hereby declare under penalty of perjury that I have read the foregoing **COMMENTS OF ACCESS TELEVISION NETWORK, INC.**, and that the facts stated therein are true and correct to the best of my knowledge, information and belief.


William H. Bernard

February 28, 1997